81-2130

No.

Office - Supreme Court, U.S.
FILED
MAY 17 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1981

MILDRED L. JOSEPH, COLEEN FINKS, LLOY GLOVER, HOPE SMALL, AND PHYLLIS FERGUSON,
Petitioners,

vs.

CHRISTOPHER S. BOND AND RAY S. JAMES,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ARTHUR A. BENSON II
Counsel of Record
1430 Commerce Tower
911 Main Street
Kansas City, Missouri 64105
816/842-7603
Counsel for Petitioners

May 14, 1982

E. L. MERRIHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

1. Whether a state may avoid the application of the constitutional principles of *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980) to a class of government agents by providing compensation for the class by fees collected by the agents while providing that another class of agents who perform virtually identical duties shall be compensated by salary and thus are protected from dismissal solely because of their political affiliation.

2. Whether a state may maintain a classification which differentiates between the First Amendment rights of two groups of government agents based upon distinctions under state tort law as to whether an agent is an employee or a contractor with an indefinite appointment.

3. Whether political affiliation is an appropriate requirement for the effective performance of the duties of government agents whose ministerial duties are only to collect fees and taxes and issue licenses.

TABLE OF CONTENTS

Questions Presented I
Table of Contents II
Table of Authorities III
Opinion Below 2
Jurisdiction 2
Constitutional and Statutory Provisions Involved 2
Statement of the Case 2

Reasons for Granting the Writ—

I. The Decision Below Conflicts With the Principles and Reasoning of Prior Decisions of This Court and If Not Reversed Will Cause a Major Ambiguity in an Area of the Law Frequently Litigated 6

II. The Decision Below Misinterprets the Interests Involved in the Exception to the Patronage Doctrine for Positions Requiring Political Affiliation and Threatens to Undermine That Doctrine and Cause Recurring Problems in Its Application 12

III. This Court Should Resolve the Questions Left Unanswered in Elrod v. Burns and Branti v. Finkel As to the Applicability of Constitutional Protection of Individuals Not Categorized As State Employees Under Principles of State Tort Law 16

IV. The Decision Below Permits the State to Maintain Two Classifications of Agents to Collect Certain Taxes and Allows the State to Terminate Members of One Class, but Not of the Other, Solely Because of Political Affiliation 18

Conclusion 19

APPENDIX—

Order Denying Motion for Rehearing A1
Order of the U.S. Court of Appeals for the Eighth Circuit, April 20, 1982 ..... A3
Final Judgment and Decree, *Joseph, et al. v. Bond, et al.* A4
Memorandum and Orders Directing Entry of Final Judgment and Decree, *Joseph, et al. v. Bond, et al.* A6
Final Judgment and Decree, *Brown, et al. v. Bond, et al.* A12
Memorandum and Orders Directing Entry of Final Judgment and Decree, *Brown, et al. v. Bond, et al.* A14
Memorandum Opinion, Findings of Fact, Conclusions of Law and Orders Directing the Entry of Judgment, *Joseph, et al. v. Bond, et al.*, 522 S.W.2d 1363 (W.D.Mo. 1981) A18
Constitutional Provisions, Federal and State Statutes Involved A80

Table of Authorities

CASES

Branti v. Finkel, 445 U.S. 507 (1980) 4, 8, 9, 10, 11, 12, 14, 16, 17
Elrod v. Burns, 427 U.S. 347 (1976) 4, 6, 8, 9, 10, 11, 12, 14, 15, 16, 17
Gibbons v. Bond, 523 F.Supp. 843 (W.D.Mo. 1981), *aff'd*, 668 F.2d 967 (8th Cir. 1982) 3, 4, 18
Joseph v. Bond, 522 F.Supp. 1363 (W.D.Mo. 1981) 5, 8, 15, 16, 18
Lefkowitz v. Turley, 414 U.S. 70 (1973) 9, 10

McMullan v. Thornburgh, 508 F.Supp. 1044 (E.D.Pa. 1981) 7
Perry v. Sindermann, 408 U.S. 593 (1972) 9
Schenberg v. Bond, No. 81-2046 ..... 4, 13
Sweeney v. Bond, 519 F.Supp. 124 (E.D.Mo. 1981) 4
Sweeney v. Bond, 669 F.2d 542 (8th Cir. 1982) 4, 5, 9, 12, 13, 16

OTHER AUTHORITIES

28 U.S.C. §1254 (1) 2
28 U.S.C. §§1331, 1343, 2201 and 2202 2
42 U.S.C. §1983 2
U. S. Constitution, First Amendment 7, 9, 10
U. S. Constitution, Fifth Amendment 10
U. S. Constitution, Fourteenth Amendment 18
Revised Statutes of Missouri, §136.040 ..... 2, 3
Revised Statutes of Missouri, §136.055 ..... 2, 3, 5, 9, 18

No.

In the Supreme Court of the United States

October Term, 1981

MILDRED L. JOSEPH, COLEEN FINKS, LLOY GLOVER, HOPE SMALL, AND PHYLLIS FERGUSON,
Petitioners,

vs.

CHRISTOPHER S. BOND AND RAY S. JAMES,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Mildred L. Joseph, Coleen H. Finks, Lloy M. Glover, Hope W. Small, and Phyllis Ferguson respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on April 20, 1982.

OPINION BELOW

The per curiam order of the Court of Appeals appears in the Appendix hereto at A2. That order reversed the District Court for the Western District of Missouri, the opinion of which is reported at 522 F.Supp. 1363 (W.D. Mo. 1981), and appears in the Appendix hereto at A18.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on April 20, 1982. A timely petition for rehearing *en banc* was denied on May 6, 1982, and this petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the First and Fourteenth Amendments set out in the Appendix hereto at A80. Also involved are 42 U.S.C. §1983, Appendix A81, and §§136.040 and 136.055, Revised Statutes of Missouri, the text of which appear at A81.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked pursuant to 28 U.S.C. §§1331, 1343, 2201 and 2202 to determine and declare federal questions raised pursuant to 42 U.S.C. §1983. The general federal question is whether fee agents of the Missouri Department of Revenue may be terminated from their positions solely because of their political affiliations.

The Missouri Department of Revenue maintains a dual scheme for the purchase by the public of boat and motor vehicle licenses and titles and for the licensing of individual drivers of motor vehicles. Such transactions with the State of Missouri may be conducted at branch offices of the Department of Revenue which are supervised by branch managers,[1] or the same transactions may be made at fee offices supervised by fee agents.[2] All petitioners are fee agents who were terminated from their positions solely because of their political affiliations. Branch managers and fee agents, while performing essentially the same governmental functions, do not stand in the same relation to the state. Branch managers were held to be state employees protected from discharge solely because of their political affiliation in *Gibbons v. Bond*, 523 F.Supp. 843 (W.D.Mo. 1981), *aff'd*, 668 F.2d 967 (8th Cir. 1982). Branch managers receive their salary from the budget allocations for the Department of Revenue and it is stipulated that they are employees of the state. Fee agents, however, receive their compensation directly from the public. The fee agents are authorized to charge an additional one dollar for each transaction which they make. The appointments of both branch managers and fee agents have traditionally been awarded to individuals politically aligned with the party of the governor in office.

In early 1981, the Democratic administration of Governor Joseph Teasdale was replaced by Respondent Christopher S. Bond, a Republican. Respondent Ray S. James was subsequently appointed as Director of Revenue and he sent notices of termination to incumbent Democratic

---

1. Appointed pursuant to §136.040, R.S.Mo., Appendix at A81.

2. Appointed pursuant to §136.055, R.S.Mo., Appendix at A81.

branch managers and fee agents, including all petitioners. As a result of these terminations lawsuits were instituted against Respondents James and Bond in their official capacities.

The litigation involving the branch managers has been concluded. A district court found that the branch managers had been terminated solely because of their political affiliation and that such affiliation was not a necessary requirement for the effective performance of the duties of branch managers, and that decision was affirmed on appeal. *Gibbons v. Bond*, 523 F.Supp. 843 (W.D.Mo. 1981), *aff'd* 668 F.2d 697 (8th Cir. 1982).

Fee agent litigation was commenced in district courts in both the Eastern and Western Districts of Missouri. In the Eastern District the fee agents argued primarily that they were public employees and thus protected by the patronage doctrine of *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980). The district court held after a trial that fee agents were not public employees and dismissed their complaint. *Sweeney v. Bond*, 519 F.Supp. 124 (E.D.Mo. 1981). On appeal the Eighth Circuit affirmed in an opinion that did not analyze the constitutional issues involved and held that fee agents were not employees and that political affiliation was an appropriate requirement for the effective performance of their duties. *Sweeney v. Bond*, 669 F.2d 542 (8th Cir. 1982). The fee agents in *Sweeney* filed a petition for a writ of certiorari with this Court on May 4, 1982 under the caption *Schenberg v. Bond*, No. 81-2046.

In the Western District of Missouri the petitioners herein initiated this litigation and admitted that they were not public employees as defined by state tort law but argued that as government agents with indefinite appoint-

ments to perform ministerial duties they were protected from discharge solely because of their political affiliation. The district court, John W. Oliver, Senior Judge, agreed in an opinion that comprehensively analyzed the constitutional issues involved. *Joseph v. Bond*, 522 F.Supp. 1363 (W.D.Mo. 1981), Appendix hereto at A18. On appeal the *Joseph* case was argued to a panel of the Eighth Circuit after a prior panel had issued its opinion in *Sweeney*. The subsequent panel was bound by the prior decision even though the prior panel had not engaged in the constitutional analysis required by the decision of the district court in *Joseph*. The Eighth Circuit, as required by the decision of the prior panel, reversed the district court in a per curiam order. Appendix at A2. The prior *Sweeney* decision required reversal of the district court in *Joseph* even though there was no conclusion by the Court of Appeals that the trial court had been clearly erroneous in any of its findings.

The trial court had found petitioners to be fee agents satisfactorily performing their duties at the time of their terminations and that the position held by each was non-policymaking and non-confidential. Appendix at A31-32. The district court further found that petitioners, all Democrats, had been terminated ". . . solely for the reason they were not affiliated with or sponsored by the Republican Party." Appendix at A59. The district court further found that petitioners ". . . were in fact dismissed on the sole basis of their belief in the political party of their choice." Appendix at A62. Finally, the trial court held that respondents ". . . have not demonstrated that affiliation with a particular party is an appropriate requirement for the duties which a Sec. 136.055 fee agent is authorized to perform." Appendix at A60, n.20.

Petitioners are now in the anomalous position of having been found by the trial court to be state agents on an indefinite appointment satisfactorily performing non-policymaking, non-confidential duties for which political affiliation is not an appropriate requirement but nonetheless lacking protection from patronage terminations because the Court of Appeals failed to analyze the underlying constitutional issues in a prior case.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With the Principles and Reasoning of Prior Decisions of This Court and If Not Reversed Will Cause a Major Ambiguity in an Area of the Law Frequently Litigated.

This Court held in *Elrod v. Burns*, 427 U.S. 347 (1976), that the dismissal of employees on a partisan basis is ". . . but one form of the general practice of political patronage." 427 U.S. at 353. After describing a "broad range" of such patronage activities, this Court stated it was ". . . here concerned only with the constitutionality of dismissing public employees for partisan reasons." *Id.* Although this Court has never held that only public employees are protected from partisan dismissal by the First and Fourteenth Amendments or that all of the other practices that form the "broad range" of patronage activities are beyond the pale of the First Amendment, nonetheless, the court below has relied upon a state tort law definition of the employee-employer relationship to dispense with the need for a constitutional analysis of the issues simply because the petitioners are not traditional employees.

The result of the decision below is that in Missouri fee agents who collect a fee per transaction but do not participate in Social Security or the state worker's compen-

sation plan lack the First Amendment protection against dismissal that is afforded to agents in Pennsylvania who also are paid by fees collected by them but happen to participate in Social Security and the worker's compensation programs of that state, *McMullan v. Thornburgh*, 508 F.Supp. 1044, 1046 (E.D.Pa. 1981), a curious distinction without basis in the Constitution. This result is not warranted by the decisions of this Court and if not reversed will cause further anomalies as some courts engage in rigorous constitutional analyses to determine which of the "broad range" of patronage activities implicate constitutional rights while others, perhaps following the court below, determine not to engage in such a constitutional analysis and hold that the only patronage activity which implicates the First Amendment is the partisan dismissal of public employees.

This Court has neither limited the patronage doctrine to employees only nor foreclosed an analysis to determine whether the doctrine applies to other forms of patronage besides dismissal of employees. As the trial court below noted, such an analysis is required:

> Both *Branti* and *Elrod* spoke in terms of "positions." Neither spoke in terms of "employees," except by way of illustration. *Branti* recognized, as the plurality opinion in *Elrod* had earlier concluded, that "it is not always easy to determine whether a *position* is one in which political affiliation is a legitimate factor to be considered." 445 U.S. at 518, 100 S.Ct. at 1294. (emphasis ours). *Branti* cited Mr. Justice Brennan's conclusion in *Elrod* which stated:
>
> > "No clear line can be drawn between policymaking and nonpolicymaking *positions*. While nonpolicymaking individuals usually have limited responsibility, that is not to say that one with

> a number of responsibilities is necessarily in a policymaking *position*. The nature of the responsibilities is critical. . . . Thus, the political loyalty 'justification' is a matter of proof, or at least argument, directed at particular kinds of jobs.' *Illinois State Employees Union v. Lewis*, 473 F.2d at 574." 427 U.S., at 367, 96 S.Ct. at 2687 (emphasis ours).

There was, of course, discussion in both *Branti* and *Elrod* of the responsibilities of particular types of "positions" or "jobs" held by particular employees but that discussion was without any suggestion whatsoever that the principles of constitutional law enunciated were to be in any way limited to persons in an employee relationship. Indeed, it is not hard to imagine that one technically categorized under state law as an independent contractor could be endowed by that "position" with policymaking responsibility and thus be outside the rule stated in *Elrod* and *Branti*.

Constitutional analysis must, however, in our judgment, necessarily apply the broader principles stated and such analysis may not properly be confined to a determination of whether a person in a particular position or job should be classified as an employee or as an independent contractor under State tort law. It is further our view that any application of the common law rules of decisions restated in Section 220 of the Restatement of Agency 2d, which relate to the determination of questions of State law as to when a master is to be held liable for the torts of his servant, has no proper place in the determination of the First and Fourteenth Amendment questions of federal constitutional law presented in this case. *Joseph v. Bond*, 522 F.Supp. 1363, 1389, Appendix at A74-75.

The constitutional analysis mandated by this Court's decisions in *Elrod* and *Branti* is particularly appropriate in factual situations such as here presented. The trial court found that the differences between branch managers and fee agents are "quite minute," 522 F.Supp. 1388, Appendix at A73, as is apparent from the state statute which authorizes fee agents, §136.055, Appendix at A81. Section One applies to fee agents and section two refers to branch managers as "agents" also and prohibits the appointment of fee agents to collect fees in a city where a Department of Revenue branch office is maintained by a branch manager. The prohibition is important to fee agents because a fee agent dependent for compensation upon the collection of a dollar fee per transaction would not make many transactions with salaried branch managers nearby performing the same duties but without the extra fee. To hold, as the court of appeals below did,[3] that such "quite minute" distinctions afford constitutionally permissible bases for withholding First Amendment protection is to elevate form over substance.

To hold simply that because fee agents are independent contractors on an indefinite appointment and not traditional employees they are not protected by the *Elrod-Branti* patronage doctrine, as the court below did, is to ignore the importance of *Perry v. Sindermann*, 408 U.S. 593 (1972) and *Lefkowitz v. Turley*, 414 U.S. 70 (1973). In *Perry* an untenured public school teacher on a one year contract was found by this Court to be protected by the First Amendment against non-renewal of his con-

---

3. The court of appeals in this case reversed the trial court by a per curiam order, Appendix at A2, citing the prior fee agents decision, *Sweeney v. Bond*, 669 F.2d 542 (8th Cir. 1982) where the Eighth Circuit stated: "We affirm the holding of the district court that '[s]ince fee agents are not state employees, they are not protected from dismissal because of their political affiliations. [citing the district court]' *Id.* at 546.

tract because of the exercise of his right of free speech. Similarly in *Lefkowitz* this Court held that architects employed as independent contractors by a state agency had the same Fifth Amendment rights as did traditional employees:

> We fail to see a difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a contractor. *Lefkowitz v. Turley*, 414 U.S. at 83.

Fee agents, then, should be no less protected in the exercise of their First Amendment rights of belief and association, especially since fee agents serve indefinitely, not for a fixed term or until the completion of a contractual task.

Unless this Court grants its writ of certiorari and reviews this decision states will be encouraged to evade the effect of the constitutional doctrines of *Elrod* and *Branti* by juggling labels and manipulating the indicia of employment. The resulting litigation will focus upon whether a litigant is an employee, whether the state is liable for his torts, whether to be classified as an employee a litigant must participate in social security, worker's compensation and a retirement plan or whether he must receive a W-2 form from the state. Federal courts will repeatedly be called upon to decide these issues of state law before reaching the constitutional issues upon which their jurisdiction is based and, predictably, the results will vary greatly. Whether or not a litigant receives a W-2 form will determine from state to state whether he has certain constitutional rights; presently Missouri and Pennsylvania thus differ as noted above.

This confusion results from the decision below and will be exacerbated if this petition is denied. A denial

of this petition will encourage other courts to restrict the *Elrod-Branti* doctrine to employees and discourage the constitutional analysis mandated by this Court. Rather than inquire into the nature of the "position" and the duties attached thereto, courts will examine compensation plans. Rather than determine whether a patronage dismissal would result in coercion of belief, courts will permit such coercion if the plaintiff is not covered by worker's compensation. Rather than examine the appropriateness of political affiliation to the duties of the job, courts will hold that such an inquiry is not material if the state cannot be held liable for the torts of the plaintiff.

To permit, as here, the termination, solely because of political affiliation, of government agents who earn their living from indefinite appointments to non-policy-making, non-confidential positions which they are satisfactorily performing, is to permit courts below to "... emasculate the principles set forth in *Elrod*," *Branti v. Finkel*, 445 U.S. at 516, just as surely as the "least common denominator test" advanced by petitioner in *Branti* as the rule of the case in *Elrod*, would have emasculated *Elrod*.

By granting the writ here sought and reviewing the court below, this Court will require all lower courts to analyze the constitutional issues raised in cases of patronage dismissals. Failure to grant the writ will encourage lower courts to follow the lead of the Eighth Circuit and evade the constitutional issues of such dismissals by relying on state law indicia of employment with a diversity of results that reflects the diversity of state law definitions of employment. The principles of *Elrod* and *Branti* will surely be emasculated by such evasions, coercion of belief will continue in many states, and litigation will be encouraged by the ambiguity resulting from the conflict of this decision with the principles and reasoning of *Elrod* and *Branti*.

For these reasons, this Court should issue its writ of certiorari to review the decision below.

II. The Decision Below Misinterprets the Interests Involved in the Exception to the Patronage Doctrine for Positions Requiring Political Affiliation and Threatens to Undermine That Doctrine and Cause Recurring Problems in Its Application.

Important governmental interests, not private or political ones, are the only interests that may be advanced by the "appropriate requirement" exception to the patronage doctrine. This Court has held that if a patronage dismissal ". . . is to survive constitutional challenge, it must further some *vital government end* by a means that is least restrictive of freedom of belief and association in achieving that end. . . ." *Elrod v. Burns*, 427 U.S. at 363 (emphasis added) That only governmental interests may be advanced by the exception to the patronage doctrine was reiterated in *Branti v. Finkel*, 445 U.S. 507, where Justice Stevens wrote that there were some circumstances where a position that is neither policymaking nor confidential may nonetheless be appropriately political. To illustrate this narrow exception Justice Stevens referred to partisan election judges and stated the test to be whether ". . . party membership was essential to the discharge of the employee's *governmental* responsibilities." *Id.* at 518 (emphasis added)

The court below, however, has misinterpreted this narrow exception in such a manner that will permit lower courts to undermine the entire patronage doctrine. The decision below was a short per curiam order, Appendix at A2, by which a panel of the Eighth Circuit reversed the trial court simply because it was bound by the prior decision of another panel, *Sweeney v. Bond*, 669 F.2d 542 (8th Cir. 1982), petition for certiorari pending in this

Court in case No. 81-2046. In *Sweeney* a panel of the Eighth Circuit held that fee agents of the Missouri Department of Revenue, whose governmental responsibilities are entirely ministerial, the collection of fees and taxes and the issuance of licenses, could be required to be affiliated with the party of the governor in office because fee agents traditionally performed certain extra-official functions. Fee agents, under the traditional patronage system are "emissaries of the incumbent administration" "reflect [the governor's] concern for courtesy, efficiency and integrity," "are symbols of the governor's office," "are traditionally looked upon as representatives of the incumbent governor" and can "actively participate in political activities." *Sweeney v. Bond*, 669 F.2d at 546. Each of these attributes is unarguably a private or partisan interest of the governor and his party in the activities of fee agents and none are governmental interests advanced by discharge of agents whose political beliefs do not conform to those of the governor. None of these purported justifications for politically determined terminations relates in any manner to the governmental interest in the duties of the positions, collecting fees and taxes and issuing licenses.

Furthermore, the panel of the Eighth Circuit in *Sweeney* held that political affiliation was appropriate in part because it had always been that way. "We hold that political affiliation is an appropriate requirement for the effective performance of fee agents and has been so regarded by both Democrats and Republicans for many years." *Id.* The Eighth Circuit so held in spite of the clear admonition of this Court. As Justice Brennan wrote:

> The decline of patronage employment is not, of course, relevant to the question of its constitutionality. It is the practice itself, not the magnitude of its occurrence, the constitutionality of which must be deter-

> mined. Nor for that matter does any unacceptability of the practice signified by its decline indicate its unconstitutionality. Our inquiry does not begin with the judgment of history, though the actual operation of a practice viewed in retrospect may help to assess its workings with respect to constitutional limitations. Compare *Brown v. Board of Education*, 347 U.S. 483 (1954) with *Plessy v. Ferguson*, 163 U.S. 537 (1896). Rather, inquiry must commence with identification of the constitutional limitations implicated by a challenged governmental practice. *Elrod v. Burns*, 427 U.S. at 354 (note omitted)

The Eighth Circuit has thus re-defined the appropriate requirement exception to this Court's patronage doctrine and it has done so upon a rationale that completely undermines the entire doctrine and, unless reversed, will encourage all lower courts to vitiate the strength of this Court's holdings. What the court of appeals below appears to be saying is not that political affiliation is necessary to the effective performance of the duties imposed by the fee agent position, the *Branti* test, but that because the position is traditionally political and has so been regarded for many years, political affiliation is an important requirement for the effective performance of the "political position" of fee agent. This proposition, however, rests on an assumption that there are duties inherently a part of the position which are political in nature and can only be successfully performed by a partisan agent. This is no more correct than to say that deputy sheriffs must be Democrats or that public defenders must be Republicans. As pointed out by Judge Oliver in the trial court below:

> Such a belief is obviously based on the untenable notion that Section 136.055 designated a member of a partisan political party as the person "to act as an

> agent of the department of revenue [in connection with] the sale of motor vehicle licenses and the collection of motor vehicle sales and use taxes." Persons appointed as part time agents of the Missouri department of revenue pursuant to Section 136.055 to collect taxes stand in no substantially different position than other agents of that department who are appointed to serve as full time employees of that department for the purpose of collecting taxes authorized by law. In short, under the law there are no Republican tax collectors and there are no Democratic tax collectors; there are only persons authorized by law to collect taxes in accordance with law. *Joseph v. Bond*, 522 F.Supp. at 1381, Appendix at A57.

The Eighth Circuit has implicitly but unmistakably held that if patronage dismissals are sanctioned by tradition and somehow advance the interests of the party in power, the test of the appropriate requirement exception has been met. The decision below would permit mayors to terminate police officers, animal control agents and building inspectors solely because of their political affiliations if done to advance the image of the mayor as a person concerned for courtesy and integrity or if done to put on the street representatives of government who are the symbols of the mayor's office. Such considerations do not advance a "government end," much less a "vital government end," *Elrod v. Burns*, 427 U.S. at 363, nor are such considerations "least restrictive of freedom of belief and association. . . ," *Id.*, in achieving the purported government end. Representatives of the government who fail to exhibit the requisite courtesy or integrity may be terminated for cause. It is thus obvious that this labored concern to find some end to justify reliance on the "appropriate requirement" exception is nothing more than a facade for an evasion of the patronage doctrine

itself. As the trial court found, petitioners were not terminated for cause but were instead terminated solely because of their private political beliefs and respondents failed to establish that political loyalty was an appropriate requirement for the effective performance of the duties of the position. *Joseph v. Bond*, 522 F.Supp. 1363 (W.D.Mo. 1981), Appendix at A60, n.20 and A79.

By relying on the prior *Sweeney* decision, the court of appeals in the decision below failed to engage in the constitutional analysis required by the *Elrod-Branti* doctrine and accepted without reasoning the unsupported argument[4] of respondents that meeting the political and symbolic needs of the governor justified terminations which were solely political. This Court should issue its writ of certiorari to review the decision below to prevent substantial weakening of its patronage doctrine and to forestall the recurring problems that must naturally follow from the decision below.

III. This Court Should Resolve the Questions Left Unanswered in Elrod v. Burns and Branti v. Finkel As to the Applicability of Constitutional Protection of Individuals Not Categorized As State Employees Under Principles of State Tort Law.

The decisions of the Eighth Circuit and the trial court below are illustrative of the uncertainty and hesitancy resulting from this Court's opinions in *Elrod* and *Branti*. Although couched in the term of "employees," the holdings of the Court drew on doctrines with applicability beyond employment; a "broad range" of patronage

---

4. Respondents did not call witnesses or offer exhibits at trial, *Joseph v. Bond*, 522 F.Supp. at 1382, n.19, Appendix at A58, and the trial court expressly held that respondents had not demonstrated the appropriateness of political affiliation as a basis for termination of fee agents, *Id.* at 1382, n.20.

activities was referenced. Those decisions spoke in terms of "positions" and "public officers," yet the Court announced the holding only in terms of public employees. The injustice resulting from a state scheme, such as Missouri's, which permits constitutional rights only in proportion to indicia of employment, is a compelling argument for this Court to delineate further the perimeters of its patronage doctrine. This Court should determine whether the First Amendment protection of the *Elrod-Branti* doctrine extends only to state employees as defined by state law or also encompasses individuals in positions closely similar to traditional employment where political allegiance is not a necessary requirement for the effective performance of the position.

The *Elrod-Branti* doctrine has met with a considerable degree of judicial disfavor and a strong reluctance on the part of the lower courts to apply the partonage principles in a manner consistent with the constitutional analysis which underpins the decisions of this Court. The decision of the Eighth Circuit, without benefit of a probing constitutional analysis, will no doubt stagnate the consideration of these issues and thereby have far-reaching implications. The decision will be seized upon to limit the applicability of the *Elrod-Branti* doctrine whenever the facts of a case do not comport with the precise factual limitations of *Elrod* and *Branti*. Thus, this is not a question which needs to await further development. An authoritative pronouncement by this Court is needed now.

IV. The Decision Below Permits the State to Maintain Two Classifications of Agents to Collect Certain Taxes and Allows the State to Terminate Members of One Class, but Not of the Other, Solely Because of Political Affiliation.

The Missouri Department of Revenue now maintains two classifications of "agents," Sec. 136.055 R.S.Mo., Appendix at A81, to collect fees and taxes and to issue certain licenses. Members of one of the classes, the branch managers, may not be terminated solely because of their political affiliation, *Gibbons v. Bond*, 523 F.Supp. 843 (W.D. Mo. 1981), *aff'd* 668 F.2d 967 (8th Cir. 1982), while members of the other class, the fee agents, may be terminated solely because of their political affiliation by the terms of the decision below. The factual differences between the two classes of agents were found to be "quite minute" by the trial court below, *Joseph v. Bond*, 522 F.Supp. 1388, Appendix at A73. As the trial court held:

> Those factual differences do not, in our judgment constitute an appropriate basis for distinguishing the principles of constitutional law articulated in *Elrod* and *Branti*. *Id.*

From the record below it is evident that the State of Missouri has imposed a substantial burden upon the exercise of fundamental freedoms by one class of agents, the fee agents, but does not similarly burden the exercise of such freedoms by the branch managers. The state has made no showing of a compelling interest in its classification and thus cannot avoid strict scrutiny of its practices under the Equal Protection Doctrine of the Fourteenth Amendment.

For this additional reason this Court should issue its writ of certiorari to review the decision below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Eighth Circuit.

Respectfully submitted,

ARTHUR A. BENSON II
Counsel of Record
1430 Commerce Tower
911 Main Street
Kansas City, Missouri 64105
816/842-7603
Counsel for Petitioners